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SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 229 and 249

Release No. 33-10415; 34-81673; File No. S7-07-13

Commission Guidance on Pay Ratio Disclosure

AGENCY: Securities and Exchange Commission.

ACTION: Interpretation.

SUMMARY: The Securities and Exchange Commission is publishing interpretive guidance to assist registrants in preparation of their pay ratio disclosures required by Item 402(u) of Regulation S-K.

DATES: *Effective Date:* [insert date of publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: John Fieldsend, Special Counsel, or Steven G. Hearne, Senior Special Counsel, at (202) 551-3430, in the Division of Corporation Finance; 100 F Street, NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION:

I. Introduction

In 2015, the Commission adopted a rule¹ to implement the pay ratio disclosure requirement² mandated by Section 953(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act.³ In doing so, the Commission stated its belief that, in order for the data points provided by the rule to be of use to investors, the pay ratio rule “should be

¹ Pay Ratio Disclosure, Release No. 33-9877 (Aug. 5, 2015) [80 FR 50103 (Aug. 18, 2015)] (“Pay Ratio Release”).

² 15 U.S.C. 78n(i).

³ Public Law No. 111-203, sec. 953(b), 124 Stat. 1376, 1904 (2010), as amended by Public Law No. 112-106, sec. 102(a)(3), 126 Stat. 306, 309 (2012).

designed to allow shareholders to better understand and assess a particular registrant's compensation practices and pay ratio disclosures rather than to facilitate a comparison of this information from one registrant to another.”⁴ Consistent with this view, the Commission stated that it sought to provide flexibility in a manner that would “reduce costs and burdens for registrants while preserving what we perceive to be the purpose and intended benefits” of the statutorily mandated disclosure.⁵ Under the final rule, registrants must provide pay ratio disclosure for the first fiscal year beginning on or after January 1, 2017, which means that registrants will begin making pay ratio disclosures in early 2018.

In light of the approaching compliance date and concerns raised about the implementation of the disclosure requirement,⁶ this release provides additional guidance to assist registrants in their compliance efforts. In addition, the Commission staff is publishing guidance about the use of statistical sampling to assist registrants in determining their median employee for purposes of the pay ratio disclosure.⁷

II. Commission Guidance

A. Use of Reasonable Estimates, Assumptions, and Methodologies and Statistical Sampling

The pay ratio rule affords significant flexibility to registrants in determining appropriate methodologies to identify the median employee and calculating the median

⁴ Pay Ratio Release, supra note 1, at 50106.

⁵ Id. at 50107.

⁶ See, e.g., letters from Business Roundtable (Mar. 23, 2017) (“BRT”), Davis Polk & Wardwell LLP (Mar. 23, 2017) (“Davis Polk”), Financial Services Roundtable (Mar. 23, 2017) (“FSR”), The Insurance Coalition (Mar. 23, 2017) (“Insurance Coalition”), National Association of Manufacturers (Mar. 23, 2017) (“NAM”), and Society for Corporate Governance (Mar. 24, 2017) (“SCG”) available at <https://www.sec.gov/comments/pay-ratio-statement/payratiostatement.htm>.

⁷ See Division of Corporation Finance Guidance on Calculation of Pay Ratio Disclosure, September 21, 2017, available at <https://www.sec.gov/rules/interp/2017/33-10415.pdf>.

employee's annual total compensation.⁸ Required disclosure may be based on a registrant's reasonable belief; use of reasonable estimates, assumptions, and methodologies; and reasonable efforts to prepare the disclosures.⁹ Specifically, the rule permits registrants to use reasonable estimates to identify the median employee, including by using statistical sampling and a consistently applied compensation measure (such as payroll or tax records).¹⁰ The rule also allows registrants to use reasonable estimates in calculating the annual total compensation or any elements of annual total compensation for employees.¹¹ The rule further provides that if a registrant changes its methodology or its material assumptions, adjustments, or estimates, and the effects are significant, the registrant must briefly describe the change and the reasons for the change.¹²

In light of the use of estimates, assumptions, adjustments, and statistical sampling permitted by the rule, pay ratio disclosures may involve a degree of imprecision. This has led some commenters to express concerns about compliance uncertainty and potential liability.¹³ In our view, if a registrant uses reasonable estimates, assumptions or methodologies, the pay ratio and related disclosure that results from such use would not provide the basis for Commission enforcement action unless the disclosure was made or reaffirmed without a reasonable basis or was provided other than in good faith.

⁸ See Pay Ratio Release, supra note 1, at 50135 - 50138.

⁹ See, e.g., Instruction 2 and Instruction 4 to Item 402(u) of Regulation S-K (17 CFR 229.402(u)).

¹⁰ See Instruction 4 to Item 402(u) of Regulation S-K.

¹¹ Id.

¹² Id.

¹³ See, e.g., letters from BRT, Davis Polk, and NAM.

B. Use of Internal Records

Item 402(u) requires a registrant to disclose the median of the annual total compensation of all its employees excluding its principal executive officer.¹⁴ We are providing guidance as to the use of existing internal records, such as tax or payroll records, to make this determination.

1. Non-U.S. Employees

The final rule defines the term “employee” to include U.S. employees and employees located in a jurisdiction outside the United States (“non-U.S. employees”). In the Pay Ratio Release, we acknowledged that the inclusion of non-U.S. employees would raise compliance costs for multinational companies.¹⁵ To address concerns about compliance costs, the rule permits registrants to exempt non-U.S. employees where these employees account for 5% or less of the registrant’s total U.S. and non-U.S. employees, with certain limitations.¹⁶ We are clarifying that a registrant may use appropriate existing internal records, such as tax or payroll records, in determining whether the 5% de minimis exemption is available.¹⁷

2. Median Employee

We also believe that the use of existing internal records may, in many circumstances, be appropriate in identifying a registrant’s median employee. Instruction 4 to Item 402(u) permits a registrant to identify its median employee using a consistently applied compensation measure, such as information derived from the registrant’s tax or payroll

¹⁴ 17 CFR 229.402(u)(1).

¹⁵ See Pay Ratio Release, supra note 1, at 50122 - 50133.

¹⁶ 17 CFR 229.402(u)(4)(ii). See also Pay Ratio Release, supra note 1, at 50124-50125 (noting that registrants using the de minimis exemption are required to provide certain disclosures).

¹⁷ See, e.g., Instruction 1 to Item 402(u) of Regulation S-K (17 CFR 229.402(u)) and Pay Ratio Release, supra note 1, at 50119 – 50120 (indicating that determination of the median employee may be made on any date within the last three months of the registrant’s last completed fiscal year).

records. We are clarifying that a registrant may use internal records that reasonably reflect annual compensation to identify the median employee, even if those records do not include every element of compensation, such as equity awards widely distributed to employees.

We recognize that, when calculating total compensation in accordance with Item 402(c)(2)(x) for the identified median employee that the registrant identified using a consistently applied compensation measure based on internal records, the registrant may determine that there are anomalous characteristics of the identified median employee's compensation that have a significant higher or lower impact on the pay ratio. The Commission discussed this issue in the adopting release specifically and noted that, in such a circumstance, instead of concluding that the consistently applied compensation measure the registrant used was unsuitable to identify its median employee, the registrant may substitute another employee with substantially similar compensation to the original identified median employee based on the compensation measure it used to select the median employee.¹⁸

C. Independent Contractors

For purposes of Item 402(u), the term “employee” or “employee of the registrant” is defined as “an individual employed by the registrant or any of its consolidated subsidiaries.”¹⁹ Item 402(u)(3) excludes from the definition those workers who are employed, and whose compensation is determined, by an unaffiliated third party but who provide services to the registrant or its consolidated subsidiaries as independent contractors or “leased” workers.²⁰ In the Pay Ratio Release, the Commission indicated that excluding

¹⁸ See Pay Ratio Release, supra note 1, at 50137 – 50138 (providing that the registrant must disclose the substitution as part of its brief description of the methodology it used to identify the median employee).

¹⁹ 17 CFR 229.402(u)(3).

²⁰ Id.

these workers is appropriate, because registrants generally do not control the level of compensation that these workers are paid.²¹

Some commenters have expressed concerns about the application of the rule’s definition of “employee.”²² Because registrants already make determinations as to whether a worker is an employee or independent contractor in other legal and regulatory contexts, such as for employment law or tax purposes, some commenters suggested that the Commission should allow registrants to use widely recognized tests to determine who is an “employee” for purposes of the rule.²³ Such a test might, for example, be drawn from guidance published by the Internal Revenue Service with respect to independent contractors.²⁴

²¹ See Pay Ratio Release, supra note 1, at Section 50165 – 50166.

²² See, e.g., letters from Davis Polk, FSR, SCG, and Insurance Coalition.

²³ See, e.g., letters from Davis Polk and Insurance Coalition.

²⁴ See, e.g., Publication 15-A Employer’s Supplemental Tax Guide (2017).

Item 402(u)(3) makes clear that an “employee” is an individual employed by the registrant.²⁵ The provision in Item 402(u)(3) indicating that the definition of “employee” does not include workers who are employed, and whose compensation is determined, by an unaffiliated third party describes one category of workers that is expressly excluded from the definition of “employee” under the rule. The provision was not intended to serve as an exclusive basis for determining whether a worker is an employee of the registrant. Accordingly, we believe it would be consistent with Item 402(u) for a registrant to apply a widely recognized test under another area of law that the registrant otherwise uses to determine whether its workers are employees.²⁶

By the Commission.

Dated: September 21, 2017

Brent J. Fields
Secretary

²⁵ 17 CFR 229.402(u)(3).

²⁶ Because we believe most widely recognized tests likely will consider how compensation is determined as a factor in identifying a registrant’s employees, we believe these tests generally would provide a reasonable means of complying with Item 402(u). See, e.g., note 24. The description of the methodology required by Instruction 4 of Item 402(u) requires a registrant to include an explanation of any material assumptions and adjustments used.

